No. 208

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968, NO. 208

AMERICAN OPTICAL COMPANY, C'BON, INC. AND COOL-RAY, INC.,
Plaintiffs-Appellees,

v.

RAYEX CORPORATION AND MONACO OPTICAL CORPORATION,
Defendants-Appellants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the United States Court of Appeals
For the Second Circuit

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IN THE

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AMERICAN OPTICAL COMPANY, C'BON, INC., AND COOL-RAY, INC.,
Plaintiffs-Appellees,

vs.

RAYEX CORPORATION AND MONACO OPTICAL CORPORATION,
Defendants-Appellants

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case on April 26, 1968, rehearing denied May 20, 1968.

Opinions Below

The opinion of June 28, 1966 of the District Court for the Southern District of New York granting plaintiffs' motion for a preliminary injunction is reported in 266 F.Supp. 342. The opinion of that Court, of April 26, 1967, refusing to vacate the preliminary injunction and holding defendants in contempt, is reported only in 153 USPQ 616. The opinion of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court in the 1967 proceeding, is reported only in 157 USPQ 465. These three opinions, together with the order of the District Court appealed from, are appended hereto, (*post*, pp. 17, 22, 43, and 44).

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on April 26, 1968 and defendants petition for rehearing was denied on May 20, 1968. The jurisdiction of this Court is invoked under Title 28 United States Code, Section 1254(1).

Questions Presented

1. Where a preliminary injunction has issued against a party, does not that party have the lawful right either to appeal, or to have that order vacated because of newly presented evidence showing that the injunction has been improvidently granted?

2. In proceedings to vacate a preliminary injunction order, and in the absence of an appeal, does not the moving party have the right to produce all evidence, without regard to when it "occurred", or came into being, which shows the injunction was improvidently granted.

3. Does Section 43(a) of the Lanham Act give a right of action for "any false description or representation" in the absence of any misleading or deception as to the source of the thing described or represented?

4. Is it lawful to hold a party in contempt of a preliminary injunction order for failing to do something not required by the order?

Statutes Involved

Lanham Act § 43(a) (15 U.S.C. § 1125(a))

"(a) Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending

falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

Title 28 United States Code, Section 1292(a)(1)

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;"

Statement of the Case

The action here is based on an alleged violation by defendants*, of Section 43(a) of the Lanham Act (15 U.S.C. § 1125(a)) (R. pp. 1-8). The District Court granted preliminary injunction (R. pp. 63-69, 73-77). Later, after a complete development of the facts by deposition, the matter came again before the District Court on defendants'

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* American Optical Company, C'Bon, Inc. and Cool Ray, Inc. will be referred to as "plaintiffs"; Rayex Corporation and Monaco Optical Corporation as "defendants". The record will employ the pagination given in the Court of Appeals and will be cited "R. ". Italics or brackets within quotes are ours, unless the contrary is indicated.

motion to vacate the injunction and on plaintiffs' motion for contempt (R. pp. 178, 235-236, 1667-1702). The Court granted plaintiffs' and denied defendants' motions, and defendants appealed R. p. 1722).

At the inception of the argument in the Court of Appeals, that Court, in apparent disregard of 28 U. S. C., Section 1292(a), attacked the right of defendant to appeal.

That Court's opinion, announced two days later, does not refer to the propriety or legality of the appeal and it doesn't contain a suggestion that the merits were considered. Instead—though its phraseology is not entirely clear—its affirmance of the lower court seems to be based on the grounds that the defendant had not appealed from the preliminary injunction order, that defendants' motion "was not based on changes in circumstances which occurred after the injunction was entered",* and that defendants were "merely trying to relitigate on a fuller record preliminary injunction issues already decided by Judge Tenney" (*post* p. 43).

Though not reached by the Court of Appeals, the record here shows that plaintiffs, in June 1966, brought their complaint asserting that defendant, Rayex, in a catalog advertising its skiglasses, had used a photograph of a pair of plaintiffs' sunglasses, called Camelot, to advertise its own skiglasses called Alpine, in violation of Section 43(a) of the Lanham Act (R. pp. 1-8). The matter was heard six days later. The defendants, unprepared, made an incomplete and ineffectual defense and the Court granted a preliminary injunction (R. pp. 17-18, 55-56, 63-69, 73-77).

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* The expression "changes in circumstances" is highly ambiguous. Counsel for defendants was asked whether the facts relied on had occurred, or come into being, after the preliminary injunction hearing, and the concession to which the opinion refers was that they had come into being before that hearing, but had not been before the Court at that time and had only been brought into the record at the time of the hearing on the motion to vacate.

Shortly after the grant of the injunction, defendants examined three of plaintiffs' witnesses on deposition and showed by their admissions that material facts, produced by plaintiffs and relied on by the lower court in granting the injunction, were basically inaccurate and misleading. Defendants thereafter took the depositions of all other parties believed to have pertinent knowledge to show that defendants had never violated Section 43(a). The record thus made—with full exercise of the right of cross-examination—was so comprehensive that the District Court spoke of "treating this as a trial" and added that his findings "would be *res judicata*" and "binding on the parties" (R. pp. 1810-1811).

The decision of the District Court on the motions for contempt and to vacate (*post*, pp. 22-42), shows

(a) that, with respect to the motion to vacate, § 43(a) was construed as creating a cause of action where there was "any false description or representation" (*post*, pp. 33-34, 41, n. 6), even though there was no proof in the record that the challenged photograph was known to or recognized by the public, or that it indicated any source, or that plaintiffs were in any way injured, or that any member of the public was confused or deceived, and even though the record here showed that defendants did not use a photograph of plaintiffs' glasses; and

(b) that with respect to the motion for contempt, the Court refused to give the slightest effect to defendants' evidence, it ignored the heavy burden of proof resting on plaintiffs (*post*, p. 24), and it held defendants in contempt for not taking action which the injunction order did not require them to take (*post*, pp. 25, 27); and

(c) that, the Court's conclusions, both with respect to the motion to vacate and the motion for contempt, seems to have been induced, at least to some degree, by the fact that, though defendants' case was vouched for by the admissions of three witnesses

connected with plaintiffs, and by the testimony of five entirely unimpeached and uncontradicted witnesses connected with defendants, together with an array of documentary and physical evidence, the controlling preconception of the Court was that defendants were guilty and that their entire case was "untrustworthy" (*post,* p. 24), and "not worthy of belief" (*post,* p. 26), and "a fabrication" (*post,* p. 35).

Reasons for Granting the Writ

(1) The Court of Appeals, in holding that a party, to secure relief from a preliminary injunction, must appeal or go to trial on the merits, is in square conflict with the decision of this Court in *United States* v. *U. S. Smelting Co.,* 339 U. S. 186 (1950); and with the Court of Appeals for the Ninth Circuit in *Tanner Motor Livery, Ltd.* v. *Avis, Inc.,* 316 F.2d 804 (1963), cert. denied 375 U. S. 821 (1963).

(2) The Court of Appeals, in holding that a party, to secure relief from a preliminary injunction, could rely only upon "changes in circumstances which occurred", that is, facts which arose or came into being, "after the injunction was entered", and could not "relitigate on a fuller record preliminary injunction issues already decided", is in square conflict with the decisions of this Court in *Marconi Wireless Co.* v. *U. S.,* 320 U. S. 1 (1943); *Drivers Union* v. *Meadowmoor Co.,* 312 U. S. 287 (1941); and *Simmons Co.* v. *Grier Bros. Co.,* 258 U. S. 82 (1922), and with the decisions of the First Circuit in *Bailey* v. *Proctor,* 166 F.2d 392, 395 (1948); the Fourth Circuit in *Webster Motor Car Company* v. *Zell Motor Car Company,* 234 F.2d 616 (1956); the Seventh Circuit in *Fidelity Trust Co.* v. *Board of Education,* 174 F.2d 642, 645 (1949); the Ninth Circuit in *Castner* v. *First National Bank of Anchorage,* 278 F.2d 376 (1960); the Tenth Circuit in *Houston Fearless Corporation* v. *Teter,* 313 F.2d 91, 92 (1962); and the District of Columbia Circuit in *Schoen* v. *Washington Post,* 246 F.2d 670, 673 (1957).

(3) The Court of Appeals, in affirming the District Court's refusal to vacate the injunction, put its stamp of approval on a decision construing Section 43(a) of the Lanham Act in a way which is in direct conflict with the decisions of the First Circuit in *Samson Crane Co.* v. *Union Nat. Sales,* 87 F.Supp. 218 (D. Mass. 1949), affirmed on the District Court opinion 180 F.2d 896 (1950); the Seventh Circuit in *Hesmer Foods, Inc.* v. *Campbell Soup Company,* 346 F.2d 356, 359, cert. denied 382 U. S. 839 (1965); the Ninth Circuit in *Chamberlain* v. *Columbia Pictures Corp.,* 186 F.2d 923 (1951); and the District of Columbia Circuit in *Gold Seal Company* v. *Weeks,* 129 F.Supp. 928, 939-940 (D. D. C. 1955), affirmed "for the reasons given" by the lower court, *sub nom S. C. Johnson & Son, Inc.* v. *Gold Seal Company et al.,* 230 F.2d 832 (1956), cert. denied 352 U. S. 829 (1956).

(4) The Court of Appeals, in affirming the District Court's holding that defendants were in contempt for failing to do something which the injunction order did not command it to do is in direct conflict with this Court's decisions in *Terminal R.R. Assn.* v. *U. S.,* 266 U. S. 17 (1924); *Longshoremen* v. *Marine Trade Assn.,* 389 U. S. 64 (1967); and with Rule 65(d) of the Federal Rules of Civil Procedure.

Argument

(1) The Court of Appeals, in its opinion here, said

> "Appellants took no appeal from that order. Instead of seeking to obtain 'a trial of the action on the merits', see Rule 65, Fed. R. Civ. P., appellants attempted four and one-half months later to have the preliminary injunction vacated despite their earlier failure to appeal" (*post,* p. 43).

Rule 65, in subparagraph (a)(2), allows the court "Before or after the commencement of the [preliminary injunction] hearing" to order trial advanced and consolidated

with the injunction hearing. It has no application to a situation arising after the injunction has been granted, and it does not even suggest that a trial on the merits is the only alternative to appeal. And that it is not, is entirely clear from this Court's opinion in the *U. S. Smelting* case (*ante*, p. 6).

That case was concerned with a failure to appeal under 28 U. S. C. § 1253, rather than Section 1292(a), as here. Section 1253 allows an appeal from a three judge court "granting or denying . . . an interlocutory . . . injunction". While Sections 1253 and 1292(a)(1) address themselves to different situations, the congressional intent clearly was the same in both cases—to give the right of appeal from an interlocutory injunction.

In the *U.S. Smelting* case the District Court reversed the Interstate Commerce Commission, granting a preliminary injunction and returning the matter to the Commission. The appellant did not appeal from the grant of the preliminary injunction, but after further proceedings, appeal was taken. The appellee urged that, because there had been no appeal from the preliminary injunction, it became "the law of the case" (339 U.S. 198). This Court disagreed. With respect to the effect of not appealing, this Court said:

> "The fact that an appeal could have been taken from the first order of the District Court was not because it was a final adjudication but because a temporary injunction had been granted in order to maintain the status quo. This was an interlocutory order that was appealable because Congress, nothwithstanding its interlocutory character, had made it appealable. 28 U.S.C. § 1253. The appellants might have appealed, but they were not bound to" (339 U.S. 198-199).

The rationale of this statement applies with equal force to matters arising under Section 1292(a)(1), and the parallel between that and this case is apparent. In both cases action had been taken from which the law allowed an appeal, but the parties aggrieved "were not bound to [appeal]".

The *U.S. Smelting* opinion also brings out the fact—of significance here—that after the first remand the "whole proceeding. . . was *in fieri*", and that "The Commission had a right on reconsideration to make a new record" (339 U.S. 198).

In the *Tanner* case (*ante* p. 6), the Court construed Section 1292(a)(1) in the same way this Court construed Section 1253 in the *U.S. Smelting* case.

One District Court judge in the *Tanner* case granted a preliminary injunction from which no appeal was taken. Subsequently a second judge dissolved the first injunction and granted another, and appeal was taken. The Court of Appeals referred to its earlier decision in the *Castner* case (*ante* p. 6) as simply an application

> "of the well-established rule that a district judge always has the power to modify or to overturn an interlocutory order or decision while it remains interlocutory" (316 F.2d 809).

Then, coming to the question of appeal, the Court further said

> "An order granting or denying a preliminary injunction is made appealable, as of right, by statute. (28 U.S.C. § 1292(a)(1)) . . . This does not mean that an order granting a preliminary injunction cannot be reconsidered by the district court if an appeal is not taken" (316 F.2d 809-810).

Jones Bros. Co. v. *Underkoffler*, 24 F. Supp. 393 (M.D. Pa. 1938), is to the same effect.

In the *U.S. Smelting* case this Court spoke of "reconsideration"; in the *Tanner* case the Ninth Circuit, referring to the right of a court to correct its earlier action, used the expression "the power to modify or to overturn" and "reconsidered". None of these expressions is equivalent to or compatible with a trial on the merits. And neither these cases nor the cases, upholding the right of a district court to reconsider its preliminary injunction order (*ante* p. 6;

post, pp. 10-11), has ever suggested any limitation on the mechanics by which reconsideration might be best achieved.

(2) The Court of Appeals noted that defendant's concession that its motion to vacate "was not based on changes in circumstances which occurred after the injunction was entered", and that

> "It is clear that by their cross-motion appellants were merely trying to relitigate on a fuller record preliminary injunction issues already decided by Judge Tenney" (*post* p. 43).

But this Court's decisions make it plain that a party, on such a motion, is not limited to facts arising after the injunction and that there may be such further proceedings as will adequately show that the injunction was granted under a basic misapprehension as to the facts.

In the *Marconi* case (*ante* p. 6), the Government asked for a particular finding which had the effect of requiring reconsideration of an earlier decision of the lower court. This requested finding was based, at least in part, on evidence which had not been before the court at the time of its earlier decision (320 U. S. 46-47). The lower court rejected this request, but this Court held that was error, saying

> "the court did not lack power at any time prior to entry of its final judgment at the close of the accounting to reconsider any portion of its decision and reopen any part of the case. *Perkins* v. *Fourniquet*, 6 How. 206, 208; *McGourkey* v. *Toledo & Ohio Central Ry. Co.*, 146 U. S. 536, 544, *Simmons Co.* v. *Grier Bros. Co.*, *supra*, 90-91. It was free in its discretion to grant a reargument based either on all the evidence then of record or only the evidence before the court when it rendered its interlocutory decision, or to reopen the case for further evidence" (320 U. S. 47-48).

The Court of Appeals decision in this case cannot be reconciled with the *Marconi* decision, either as to the type of evidence to be used or as to the nature of the "reconsideration".

The concept of limiting consideration to events occurring after the original injunction has its only reason for being in cases like *United States* v. *Swift & Co.*, 286 U.S. 106 (1932). There, the question was whether the Court would vacate or modify a permanent injunction, which, as of the date of its entry, was sound and unassailable, and as to which the relief sought was based solely on events occurring after the injunction (286 U. S. 111-113). Here the facts are at opposite poles to those in the *Swift* case. Here the injunction was preliminary and not permanent and here the injunction was prompted by facts which, it now is admitted, were basically inaccurate. The *Swift* case is entirely inapposite here.

The guiding principle of all of the cases holding that the basis for a preliminary injunction may be reconsidered is that the injunction "is no longer warranted" (the *Drivers Union* case, 312 U. S. 298); or that revision is "consonant with equity" (the *Simmons* case 258 U.S. 91). No case has hobbled the rule, as did the Court of Appeals here, by making an earlier decision an iron curtain which, whether right or wrong, could not be penetrated.

(3) The lower Court held that a case was made out under Section 43(a) of the Lanham Act by what it considered proof of a "false description or representation", without anything more.

The Court of Appeals, by affirming, has ratified and confirmed that decision.

Section 43(a), a broadening of Section 3 of the Trademark Act of 1920 (Act of March 19, 1920, c. 104, § 3, 41 Stat. 534), gives a cause of action to "any person who believes that he is or is likely to be damaged" by another "who shall . . . use in connection with any goods . . . a false designation of origin, or any false description or representation, including . . . symbols tending falsely to . . . represent the same [goods]" (*ante* pp. 2-3).

It seems to be generally agreed that the section creates a new right of action (the *Samson* case, *ante* p. 7, 87

F.Supp. 222; *Federal-Mogul-Bower Bearings, Inc. v. Azoff*, 313 F.2d 405, 409-410; the *Gold Seal* case, *ante* p. 7, 129 F. Supp. 939-940), but the courts are not in agreement as to the breadth of the right. This conflict might well be resolved by this Court, which, up to now, has not considered Section 43(a).

That section is a part of the Lanham Act and the Lanham Act, according to the final paragraph of Section 45 (15 U. S. C. § 1127), relates primarily to trademarks and, to a lesser degree, to unfair competition (see also Report of Senate Committee on Patents, No. 1333, of May 14, 1946, on H. R. 1654 (U. S. Code Congressional Service 1946, pp. 1274-1278)). It is only reasonable, therefore, to analogize the cause of action given by Section 43(a) to actions for trademark infringement or unfair competition. And many of the cases have so held. Thus, in the *Samson* case, the court said

> "The language of Section 43(a) is broad enough to include practices of this latter class [that is, other forms of misrepresentations having the general character of trademarks]. But the section should be construed to include only such false descriptions or representations as are of substantially the same economic nature as those which involve infringement or other improper use of trade-marks. It should not be interpreted so as to bring within its scope any kind of undesirable business practice which involves deception, when such practices are outside the field of the trade-mark laws, and especially when such undesirable practices are already the subject of other Congressional legislation, such as the Federal Trade Commission Act (87 F. Supp. 222).

To the same effect, the Ninth Circuit, in the *Chamberlain* case (*ante* p. 7), said

> "However, we do not think said section [15 U. S. C. § 1125(a)] changes the fundamental requirements necessary to sustain a suit for unfair competition, one such requirement being a direct injury to the property rights of a complainant by passing off the particular goods or services misrepresented as those of complainant. Deceiving the public by fraudulent means, while an important factor in such a suit, does

> not give the right of action unless it results in the sale of the goods as those of the complainant'' (186 F. 2d 925).

The District Court here followed no such process of reasoning.

It refused to hold plaintiffs to the requirement of showing ''a false designation of origin'', saying

> ''to sustain a cause of action under § 43(a) of the Act, a plaintiff must allege *either* 'a false designation or origin, *or* any false description or representation' (Emphasis added [by the Court]) . . . 'Plaintiffs appear to have clearly brought themselves within the second alternative'' (*post,* p. 42, n. 6).

In so holding, the lower Court made it unnecessary for plaintiffs to prove anything beyond the bare fact that defendants were using a photograph of plaintiffs' Camelot glasses. And since the Court disregarded all of defendants' evidence, it did not require much proof to convince it that the photograph was of Camelot. But, as has been noted, there are no proofs here that plaintiffs' glasses, or a photograph of them, conveyed any message to or confused or deceived anyone (*ante,* p. 5).

Plaintiffs could make no such proofs. Camelot, by admission, first appeared in February 1965 (R. p. 580; see also p. 675), only five or six months before the distribution of the accused catalog of defendant, Rayex (R. pp. 859, 1170). Plaintiff showed no recognition of or demand for these glasses, and it refused to show the number of such glasses made or sold, or the area of distribution (R. pp. 675-677), and, at the time the accused catalog appeared, the public was as unconscious of and as indifferent to Camelot as it was to bricks, or shingles or any other anonymous commodity.

Under such circumstances, to hold that a valid cause of action has been shown, is to create, in Section 43(a), a far

more sweeping right than any given by the law of trademarks or of unfair competition. Thus, while an action either for trademark infringement or for unfair competition requires a misleading as to the origin or source or some form of passing off (*Canal Company* v. *Clark*, 80 U. S. 311, 323 (1871); *Sears Roebuck & Co.* v. *Stiffel Co.*, 376 U. S. 225 (1964); *Compco Corp.* v. *Day Brite Lighting*, 376 U. S. 234 (1964)), an action under Section 43(a), construed as the lower court construed it, would require only a bare misrepresentation which might be of a meaningless detail which had mislead no one. Thus, that section would blanket the entire field of trademark and unfair competition law, without any requirement that there be deception or confusion as to origin, or any of the other basic preconditions required to satisfy those laws.

(4) The original preliminary injunction order required that defendants

> "Withdraw their Astro-Ski catalog . . . by mailing to all persons, firms, organizations and companies known or believed to possess a copy of same, a letter in the form annexed . . ." (R. p. 74).

The sole basis for the Court's holding of contempt was its belief that enough letters had not been sent.

The plaintiffs produced no evidence that any person who had a copy of the catalog did not get the letter called for by the order. The burden was on the plaintiffs, asserting the contempt, and that burden could be sustained only by clear and convincing evidence (*Oriel* v. *Russell*, 278 U. S. 358 (1929)).

But the District Court did not ask that plaintiffs produce any such evidence. Instead, the Court held defendants in contempt, apparently, because it felt that

> "a proper compliance with the 'spirit' of the injunction would have obliged defendants at least to attempt to have their wholesalers pass on the message to their respective customers" (*post*, p. 25).

And that

> "at least some effort should have been made to secure some action on the part of the distributor

> without revealing to whom he distributed, that the information would be passed on . . . if they [defendants] had sincerely intended to comply and not in just a superficial way comply with the order of the court, and even if their intentions were the best, I can hold them in civil contempt" (R. pp. 1774-1775; see also R. pp. 1781-1795).

However, while the injunction order plainly required defendants to send letters to persons, etc. "known or believed to possess a copy of [the catalog]", it, just as plainly, did not require defendants "to attempt to have their wholesalers pass on the message to their customers".

In the Terminal R.R. case (*ante* p. 7), it was said

> "In contempt proceedings for its enforcement, a decree will not be expanded by implication or intendment beyond the meaning of its terms when read in the light of the issues and the purpose for which the suit was brought, and the facts found must constitute a plain violation of the decree so read" (266 U. S. 29).

Consistently with this decision, Rule 65(d), F. R. C. P., requires that an injunction "shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained".

The injunction here, in the words of this Court in the *Longshoremen's* case (*ante* p. 7),

> "clearly failed to comply with [Rule 65(d)], for it did not state in 'specific . . . terms' the acts that it required or prohibited" (389 U. S. 76).

Specifically, the order did not require defendants to "pass on the message" to the customers of defendants' customers.

The *Longshoremen's* case also makes it plain that defendants had no obligation to guess, under pain of contempt, what "the 'spirit' of the injunction" is. In that case, this Court said

> "The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be

understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the court intends to require and what it means to forbid'' (389 U. S. 76).

Conclusion

On the procedural question here involved, the decision of the Court of Appeals, in direct conflict with the decisions of this Court, has erected a barrier to the reconsideration by lower courts of improvidently granted preliminary injunctions. On the merits, the Court of Appeals, in affirming, has ratified and confirmed the lower Court's decision. which is in direct conflict with the decisions of at least four other circuits. And, in affirming the holding of contempt, which is based on defendant's failure to do something it was not required to do, the Court of Appeals again has brought itself into direct conflict with the decisions of this Court.

To bring the decision below into conformity with established law, this petition should be granted.

Respectfully submitted,

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APPENDIX

Opinion on Preliminary Injunction Proceeding (June 28, 1966)

[Reported in 266 F. Supp. 342]

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

CHARLES H. TENNEY, D. J.

[63] This motion is to enjoin certain alleged activities of the defendants herein. Jurisdiction of the Court is based on Sections 39 and 43(a) of the Lanham Act, 15 U. S. C. §§ 1121, 1125(a), as well as diversity of citizenship.

The activity involved is the alleged use by defendants, in their sunglass catalogue, of a photograph of plaintiffs' higher quality sunglass in connection with sales of its(*) (defendants') inferior quality glass.

Plaintiff American Optical Company has, for the past twenty-five years, manufactured and sold sunglasses and lenses therefor. Plaintiff C'Bon, Inc. (herein- [64] after referred to as "C'Bon") is a wholly-owned subsidiary and was created in 1965 for the purpose of creating, promoting and selling a quality line of high-style sunglasses.

Defendants Rayex Corporation and Monaco Optical Corporation are also in the sunglass field, and while the sunglass products listed in the catalogue are primarily directed toward the ski enthusiast, I find sufficient relationship between the products of plaintiffs and defendants so that they are in competition. (A reading of plaintiffs' advertising material reveals a "year-round" appeal.)

Involved herein is plaintiff C'Bon's Camelot style sunglass (hereinafter "Camelot"), photographs as well as samples of which were submitted at the hearing. Camelot is an expensive ($17.50) wrap-around, year-round sunglass

(*) The catalogue is printed by the Rayex Corporation. Exhibit 5-b, the actual Alpine model, has "Monaco Optical" stamped on its price tag.

with distinctive styling and is averred to be the best selling line of C'Bon. Suffice it to say that it is a better quality sunglass than defendants' (the Alpine model sells for $9.95, and to the inexperienced eye its styling is not as chic and smooth as Camelot's).

In defendant Rayex Corporation's catalogue circulated in December of 1965, there appears a photograph of [65] sunglasses identified as its Alpine style No. 1011. It is this photograph upon which plaintiffs predicate the requested relief.

Section 43(a) of the Lanham Act in pertinent part provides:

> "(a) Any person who shall . . . use in connection with any goods . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods . . . to enter into commerce, and any person who shall with knowledge of the falsity of such . . . description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action . . . by any person who believes that he is or is likely to be damaged by the use of any such false description or representation."

There is no dispute that the items herein entered interstate commerce.

Plaintiffs contend that this picture of defendants' Alpine style No. 1011 is in fact a photograph of their Camelot style. A visual comparison of the catalogue picture with plaintiff's Exhibit 4-A and a comparison of plaintiffs' Exhibit 7 with plaintiffs' Exhibit 8-A reveals, at least in a prima facie manner, if not conclusively, that the catalogue picture is indeed a [66] photograph of the Camelot. The

affidavit of Mr. Agraz, a commercial photographer, his comparison of the various exhibits and his method of comparison are most persuasive and are in no way disspelled by counterbalancing evidence.[1]

Defendants, in opposition, assert that they never used a photograph of plaintiffs' sunglasses to sell their Alpine model (presumably in the catalogue); they further assert that they, independently of plaintiffs, produced a "handmade prototype" of their glasses, from which they photographed the picture in the catalogue. This prototype, however, has not been produced, nor has the photograph of the prototype that was turned over to the printer. There is no affidavit of Harvey Dressner, who photographed the prototype nor any affidavit of the printer. Accordingly, it is difficult on such an insufficient showing to credit defendants' story that a prototype ever existed. Indeed, the comparison of the photographs reveals that not only was the prototype, if it existed, "dimensionally the same as plaintiffs' Camelot glass" (Tunkel affidavit ¶3), but it must have been an exact replica. Absent some substantiation of this averment I am unable to accept its veracity on the within application.[2]

[67] Accordingly, I believe the evidence to be sufficient preliminarily to justify a finding that the catalogue photograph is the "Camelot", and that therefore defendants have committed a wrong[3] by using a photograph of plaintiffs' product to sell their own inferior quality product and indeed filing orders with models different from that pictured in the catalogue.

Initially, there was some question in my mind as to whether plaintiffs' application was precluded by laches. However, in supplemental papers plaintiffs have sufficiently shown due diligence in securing the requisite information so as to dispel this problem.

It also appears that defendants have prepared a new catalogue properly depicting the Alpine model. That such

is the case does not, of course, cure the present wrong, and while defendants may send out the other catalogue all copies of the catalogue involved herein should be forthwith withdrawn and not used.

All bills for orders filled up to this date are to segregated so that when the action is tried on the merits the Court will be able to more easily ascertain [68] the sales attributable to the catalogue. Orders *submitted* and filled *after* the new catalogue is circulated will not be enjoined but all orders filled within a sixty-day period from the date that the new catalogue is circulated are to be segregated as well. All orders as of this date which are not filled shall be enjoined and returned to the buyer, and no orders on the said Alpine model are to be filled until the new catalogue has been sent out and directions given to destroy the old catalogue.

The Court, however, will not enjoin the sale of the actual Alpine glasses properly denominated and pictured as such in a new catalogue, since the actual Alpine glasses (plaintiffs' Exhibit 5-A and 5-B) are not similar to the Camelot. (See Carlson Affidavit ¶3.)

The findings of fact and conclusions of law, as required by Rule 52(a), are contained herein.

Settle order along the lines of that settled in *Surrey, supra,* no later than 4:00 P.M., June 30, 1966, on one (1) day's notice, suggesting the amount of security under Rule 65(c).

Dated: New York, New York
June 28, 1966.

/s/ Charles H. Tenney
U. S. D. J.

Opinion on Preliminary Injunction Proceeding
(of June 28, 1966)

[69] FOOTNOTES

(1) Pg. 53a. The difference in lens color is irrelevant as the issue herein is whether defendants used plaintiffs' products (distinctive frame) in advertising their (defendants') product.

(2) Pg. 53a. Moreover, even accepting that which defendants state, they concede that their prototype was "dimensionally the same" as plaintiffs', that one of the European manufacturers stated that he was about to begin the manufacture of a glass of the "same style as the Camelot glass", and that defendants ordered 2,000 of these frames. Thus, coincidentally, since the prototype was dimensionally the same as the Camelot, and the order was for the Camelot frame, the photograph in the catalogue looks as if it is a photograph of the Camelot. However, while the advertised picture is either the Camelot itself or that which is identical to the Camelot, the Alpine sunglass that was ultimately sold to fill the order was dissimilar in certain obvious respects, both in overall visual impression and in specific detail. (See Carlson Affidavit ¶ 3.)

(3) Pg. 53a. See, e.g., *National Dynamics Corp.* v. *John Surrey, Ltd.*, 238 F. Supp. 422, 423 (S. D. N. Y. 1963) and cases therein cited; cf., *Mastro Plastics Corp.* v. *Emenee Indus. Inc.*, 16 App. Div. 2d 420, 228 N. Y. S. 2d 514 (1st Dep't), aff'd without opinion, 12 N. Y. 2d 826, 236 N. Y. S. 2d 347, 181 N. E. 2d 360 (1962) (Granting leave to replead under Section 43(a)), 19 App. Div. 2d 600, 240 N. Y. S. 2d 624 (1st Dep't 1963) (Mem.), aff'd without opinion, 14 N. Y. 2d 498, 248 N. Y. S. 2d 223 (1964); see generally, *Blazon, Inc.* v. *De Luxe Game Corp.*, 65 Civ. 697 at 17-23 (S. D. N. Y. 5/11/65, per Tenney, J.); see also *Glenn* v. *Advertising Publications, Inc.*, 148 U. S. P. Q. 645, 653-55 (S. D. N. Y. 3/2/66, per McLean, J.).

Opinion on Defendants' Motion to Vacate Preliminary Injunction, and Plaintiffs' Motion for Contempt (April 26, 1967)

[Reported only in 153 USPQ 616]

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Opinion

CHARLES H. TENNEY, D. J.

[1667] On July 1, 1966, after a hearing had been held on plaintiffs' motion for a preliminary injunction, this Court ordered that the defendants be restrained and enjoined pending determination of the within action from continuing further activity and further ordered defendants to take certain affirmative steps, both of which directives will be more fully described hereinafter. See prior opinion in *American Optical Co.* v. *Rayex Corp.*, F. Supp. , 66 Civ. 1633, S. D. N. Y., June 28, 1966. Plaintiffs move to cite defendants for contempt for failure to comply with the aforementioned order, in response to which the defendants have cross-moved for vacation of the order.

[1668] This litigation involves the alleged use by defendants, in their ski-sunglass catalog, of a photograph of plaintiffs' higher quality sunglass in connection with sales of defendants' inferior quality glass.

Plaintiff American Optical Company (hereinafter referred to as "AO") is a leading manufacturer and seller of sunglasses and lenses. Plaintiff C'Bon, Inc. (hereinafter referred to as "C'Bon") is a wholly-owned subsidiary which was created in 1965 for the purpose of creating, promoting and selling a quality line of high-style sunglasses. Defendants Rayex Corporation (hereinafter referred to as "Rayex") and Monaco Optical Corporation (hereinafter referred to as "Monaco") are also in the sunglass field. The sunglass catalog in issue herein is primarily directed toward the ski enthusiast.[1]

In defendant Rayex' "Astro-Ski" catalog circulated during 1965-1966, a photograph of sunglasses appeared designated as Alpine style No. 1011. Plaintiffs contend that this picture of Alpine style No. 1011 is in [1669] fact a photograph of plaintiff C'Bon's "Camelot" style glass. Indeed, this Court, in its prior order, found that sufficient evidence had been submitted preliminarily to justify a finding that the catalog photograph was of the Camelot.

An order was entered on July 1, 1966, enjoining and restraining defendants *inter alia* from using a photograph of the Camelot to sell defendants' Alpine model; using such a photograph in defendants' catalogs and advertisements; circulating a catalog or advertisement which contained such photograph; and selling said Alpine model pursuant to orders received but not filled as of June 28, 1966 or pursuant to orders received after June 28, 1966 but prior to circulation of defendants' new catalog.

Additionally, defendants were ordered to withdraw their "Astro-Ski" ski-glass catalog "By mailing to all persons . . . known or believed to possess a copy of same, a letter in the form annexed as Exhibit A to this Order"; destroying all copies of said catalog in defendants' custody or control; and changing the designation [1670] of the 1011 Alpine. Defendants neither sought reargument nor appealed this decision.

PLAINTIFFS' MOTION TO PUNISH FOR CONTEMPT.

The basic argument presented by plaintiffs is that, although thousands of catalogs had been printed, only eleven so-called Exhibit A letters were circulated (if that many) and that these letters varied from the format of the letter designated by the Court as the letter to be used. Defendants contend that plaintiffs have failed to sustain their burden of proof that the injunction order was not complied with, and that the variation present in the letter allegedly sent was necessary as a matter of sound business judgment.

While it is fundamental law that a party seeking to punish his adversary for civil contempt must satisfy his

burden of proof by clear and convincing evidence, *Hart Schaffner & Marx* v. *Alexander's Dep't Stores, Inc.*, 341 F. 2d 101, 102-03 (2d Cir. 1965) (per curiam); *Stringfellow* v. *Haines*, 309 F. 2d 910, 912 (2d Cir. 1962), this Court is of the opinion, contrary [1671] to defendants' contention, that plaintiffs have more than amply sustained this burden, and that defendants' conduct has been in blatant disregard of the aforesaid preliminary injunction. The consistent manner in which defendants' "evidence" has disappeared*, the convenient appearance at this time of material evidence nowhere accounted for at the time of the prior hearing, the haphazard manner in which defendants have kept their business records, the inconsistencies in statements made by defendants' employees on oral deposition and the superficial manner in which defendants have attempted to explain away these inconsistencies lead the Court to believe that, both for the purposes of this motion and for defendants' cross-motion, the evidence and testimony submitted by defendants is untrustworthy.

Raymond Tunkel, president of defenants Rayex and Monaco, stated in his deposition dated August 15-16, 1966 that in full compliance with the abovementioned order eleven Exhibit A letters were sent to wholesale distributors. In his affidavit submitted in conjunction with last June's application for an injunction, Tunkel stated that "The printer delivered to RAYEX a single edition of [1672] *several thousand* copies of the ASTRO-SKI catalog in color, in mid-July, 1965." Tunkel Affidavit of June 13, 1966, at ¶14. (Emphasis added.) This "several thousand" turned out to be 15,250 copies, 9,000 of which were delivered to Rayex, New York, with the remaining catalogs being sent to Rayex, Canada, to Mail Pouch Tobacco Company, a distributor in the tobacco field, and Beconta, Inc., who was to be Rayex' exclusive distributor in the ski industry.

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* *E.g.*, the Alpine prototype and related documents and the Hallerman itinerary discussed *infra*.

When Tunkel allegedly wrote to the eleven wholesale distributors, he did not request that these distributors ask their customers to withdraw the catalogs sent to them nor did he seek customer lists from his distributors because they would have become "indignant" as a result of such a request and would have threatened to stop doing business with Rayex. Although I do not think the injunction order would have required the Rayex attempt to obtain customer lists from its wholesale distributors and thereby endanger customer relations, a proper compliance with the "spirit" of the injunction would have obliged defendants at least to attempt to have their wholesalers pass on the message [1673] to their respective customers. This was not done. See *Hollaner* v. *Hollander,* 318 F. 2d 818 (2d Cir.) (per curiam), cert. denied, 375 U. S. 831 (1963); *Cassidy* v. *Puett Elec. Starting Gate Corp.*, 182 F. 2d 604, 606 (4th Cir. 1950). In this case it would be more than simply complying with the "spirit" of the order since defendants were to notify *all* persons "known or believed to possess a copy of" the offending catalog.

Moreover, in paragraph 15 of the Tunkel affidavit of June 13, 1966, it was stated that "This edition [the Astro-Ski catalog in issue] was promptly sent out by mail *to wholesale distributors of our regular glasses,* as well as to an exclusive ski distributor [Beconta]." (Emphasis added.) In his deposition, Mr. Tunkel drastically limits this statement: "Immediately after receipt [from the printer], they were circulated *to those few people who I thought would be proper for this catalog.*" Tunkel Deposition of November 14-15, 1966, at 817. (Emphasis added.) The first Tunkel statement creates an impression that all or quite a few of the regular customers of Rayex had received such a catalog while the second statement negates any such connotation. [1674] The reason for the inconsistency is obvious: At the time the Tunkel affidavit was prepared, there was no necessity of showing any limitation in the pos-

sible number of distributed catalogs, but at the time of the Tunkel deposition such a need had arisen, for if the catalog had been sent to Rayex' regular customers why was a letter not sent to each of these customers directing the withdrawal of such catalog? Again, in the earlier Tunkel affidavit it is stated that certain changes were made in the 1011 Alpine but these changes were not reflected in the catalog picture because the catalog "had then already been *widely distributed.*" Tunkel Affidavit of June 13, 1966, at ¶19. Obviously, this does not jibe with Tunkel's limited distribution statement made on oral deposition in November of 1966 which has been set forth *supra.* I therefore conclude that Tunkel's later statement in his deposition, made at a time when he had a reason to falsify, is not worthy of belief.[2]

Accepting Tunkel's earlier statement that the catalog was sent to wholesale distributors of Rayex' regular sunglasses, it appears that Rayex reached between [1675] three and five thousand names on its Addressograph mailing list (Tunkel Deposition of November 14-15, 1966, at 866-67) rather than the approximately eleven names it claims were reached. Accordingly, it is my opinion that a minimum of three thousand letters should have been sent.

However, the word "minimum" must be stressed because further evidence leads me to believe that additional persons should have been contacted. Gordon Hallerman, the assistant sales manager of Rayex, stated on oral deposition that he had been on a number of selling trips during the months of September to December, 1965. During that period of time, he worked with Rayex sales representatives and called upon between 200-300 accounts. For those glasses that were not as yet available, sales were made by reference to the Astro-Ski catalog. Hallerman stated that at this time he and the sales representatives had the Astro-Ski catalog and that this was shown to prospective customers. Hallerman Deposition of November 8-9, 1966, at 403-04. Defendants contend that the major

portion of the Hallerman testimony [1676] is irrelevant because it refers to the regular sunglass business of Rayex rather than to the Astro-Ski line. However, in my opinion, while at best the record in some instances is unclear, with respect to the above-mentioned information it is perfectly apparent that Hallerman and the sales representatives had the disputed catalog in their possession and exhibited it to prospective customers in an attempt to induce sales.

Certainly, then, notice of withdrawal of the catalog should have been given to the sales representatives and some effort should have been made to have these sales representatives give notice to their customers to fully comply with the injunction. In this respect, it is interesting to note that Hallerman had an itinerary of his sales trips which has, according to him, been lost or destroyed. Taken alone, this factor would possibly be credible. However, when taken in conjunction with the complete lack of any documentation on the part of defendants as to which distributors had received the catalog and the completely lackadaisical manner in which records of the catalog mailing were kept, the Hallerman representation that no list of customers visited in the fall of 1965 was [1677] available, is suspect. In any event, no explanation has been given for the failure to notify defendants' sales representatives of this Court's decision.

Hallerman further testified that after the injunction had been granted,

> "Mr. Tunkel called a meeting of myself, Mr. Friedman [Rayex vice president in charge of sales] and a few other people and he asked us to sit down and think of all possible customers, the names of all customers that we could think of to whom we delivered the Alpine 1011. . . ." Hallerman Deposition of November 8-9, 1966 at 346-47.

"Well, as I said before, a group of us sat down and tried to decide the names of those customers that we were familiar with, people that we had either called on or people from whom we might have received a request, any sort of information we could come up with which would help us in determining the names of the customers, and we tossed many names around and we wrote them down.

When we felt that we had exhausted every name that we could think of, we then went to what we call our blue file. Our blue file is a record kept in alphabetical order of the customers to whom we shipped merchandise and any shipments made there would be a blue for those shipments and we went through every name that we had.

Many of them we did not, indeed, ship the 1011 Alpine, we had shipped other glasses, but we did, in fact come across a few names where we did make shipment." *Id.* at 347-48.

The foregoing statement appears to represent the sum total of the action allegedly taken by [1678] defendants to fully comply with paragraph 2A of this Court's injunction order.[3] Plaintiffs contend that the very least defendants should have done at this point was to pull the blue file card for every customer who received *any one* of the Astro-Ski products depicted in the offending catalog. The Rayex catalog set forth seven styles of sunglasses and two assortments or "package deals". Plaintiffs argue that purchasers of any of the six styles other than the 1011 Alpine and of the two assortments must have used the condemned catalog in making such purchase and therefore notice should have been given to these customers as well. Counsel for defendants admit that there is some merit to this argument but claim, if anything, that this was a matter of judgment. Transcript of hearing of January 18, 1967, at 35.

Ordinarily, I would concede that defendants' failure to follow plaintiffs' suggestion would be no more than a judgment error. However, in light of what has already been set forth herein, I find that this just one further example of defendants' cavalier attitude toward an order of this Court.[4]

[1679] One further observation is in order in light of the foregoing, Rayex admittedly received 9,000 copies of the condemned catalog which would have been a sufficient amount to distribute to all of the persons on its mailing list, to its sales representatives, and still make credible its statement that several thousand catalogs were destroyed. Rayex argues that ten wholesale customers could have received five hundred catalogs each and therefore all recipients were thus notified. Although, as noted, plaintiffs have a very substantial burden of proof on this contempt motion, it is my opinion that this burden has been adequately satisfied and the burden of going forward must shift to defendants at this point. No showing whatsoever has been made by Rayex with respect to the number of catalogs received by those persons to whom notice of the injunction was allegedly given. Here, again, defendants have no records to substantiate their argument.

The Exhibit A letter which was to be sent to defendants' distributors stated that "Our new ASTRO-SKI catalogue will be out shortly." The letter [1680] that was allegedly sent to the eleven distributors stated, "Our new Astro-Ski catalog covering the 1966-1967 season is herewith enclosed." Plaintiffs contend that defendants rushed through two hundred copies of the new catalog to soften the effect of the Court's order. Defendants claim that the catalog was needed for a sales meeting. An examination of this catalog and a comparison with a later run thereof reveal an imperfection in color of the earlier run and lend support to plaintiffs' claim that these were hurriedly prepared. However, I need not speculate as to the reason for the rushed preparation of the new catalog since the evidence of defendants'

contempt has been sufficiently set forth. Suffice it to say that, taking this allegation with all of plaintiffs' other evidence, it would appear that this was an attempt to soften the effect of the Court's order, and defendants' conduct in not seeking an order of this Court amending the Exhibit A letter appears questionable. However, under the circumstances, little weight need be given to this factor.

Rayex argues, first, that no facts have been adduced which would show that it failed to comply [1681] with the preliminary injunction order; second, that the catalog was obsolete and it was therefore believed that it would no longer be in anyone's possession; and, third, that compliance was as complete as possible since there was no mailing list for the ski-glass catalog.[5]

The first argument is without merit as has been demonstrated previously herein. The second argument immediately brings one question to mind: If it was believed that the catalog was not in anyone's possession, why was notice of the Court's order sent to anyone? Additionally, the fact that the catalog may have been nearing the end of its useful life does not establish that customers did not have copies of it which they still utilized to place orders from Rayex, especially in light of the fact that a new catalog had not as yet been issued. If the meeting to determine who was in possession of the condemned catalog in fact took place, from the deposition testimony of Tunkel and Hallerman it would appear that any discussion of obsolescence was an afterthought—an excuse for the failure [1682] to comply with the injunction. As plaintiffs correctly argue, "Defendants had no way of knowing whether or not catalog recipients had destroyed or discarded the catalog and the only way they could have complied with this Court's Order . . . would have been to advise all possible customers of this Court's Order." Plaintiffs' Reply Memorandum, at 2. The only conclusion that this Court can reach is that defendants' obsolescence argument is a further manifestation of their continued bad faith in complying with the clear terms of the

injunction. Finally, defendants' third argument is refuted by the Tunkel affidavit which stated that the catalog was circulated to Rayex' regular wholesale distributors.

Accordingly, based on all the evidence presented, the Court is firmly convinced that plaintiffs have overwhelmingly sustained their burden of proving defendants' contempt.

The Applicable Law and the Formulation of an Appropriate Remedy.

It is well established that defendants cannot now question the propriety of the injunction order since they neither appealed that order nor sought reargument. [1683] *Alemite Mfg. Corp.* v. *Staff*, 42 F. 2d 832 (2d Cir. 1930); see *Leighton* v. *Paramount Pictures Corp.*, 340 F. 2d 859 (2d Cir.), cert. denied, 381 U. S. 925 (1965). Thus the only issue facing this Court on plaintiffs' motion to punish for contempt is whether defendants have complied with the terms of the order and in particular paragraph 2A thereof. And, as has been hereinbefore set forth, this issue is determined adversely to defendants. Since defendants have failed to comply with the order, plaintiffs, as a matter of right, are entitled to have them held in civil contempt with only the manner of the punishment being within the Court's discretion. *E. Ingraham Co.* v. *Germanow*, 4 F. 2d 1002 (2d Cir. 1925); *In re Sylvester*, 41 F. 2d 231, 236 (S. D. N. Y. 1930).

On this motion to punish for contempt, plaintiffs seek attorney's fees, motion costs for both the contempt proceedings and for defendants' cross-motion and an enlargement of the injunction order to the extent of requiring defendants to discontinue all sales of the Alpine sunglass style. It is my opinion that plaintiffs should be awarded the first two items but not the last.

[1684] When counsel for plaintiffs informed newly-appointed defense counsel that they would seek to punish defendants for contempt, counsel for Rayex obtained an

agreement that the motion would be deferred "until the entire Rayex story was presented." In presenting the Rayex story, defendants intertwined the contempt issues with those concerning the motion to vacate. As will be developed *infra*, the presentation of this complete record more fully convinces me that the preliminary injunction was not improvidently granted and that defendants have merely employed tactics which appear to have been designed to divert the Court's attention from the contempt issue. Accordingly, defendants are ordered to compensate plaintiffs for their reasonable expenses incurred in presenting the contempt issue to the Court, *Parker* v. *United States*, 153 F. 2d 66, 71 (1st Cir. 1946); *Eustace* v. *Lynch*, 80 F. 2d 652, 656 (9th Cir. 1935); *Christensen Eng'r Co.* v. *Westinghouse Air Brake Co.*, 135 Fed. 774, 782 (2d Cir. 1905), and this compensation, of necessity, must include the expenses incident to defendants' cross-motions since both motions are interrelated and since plaintiffs properly used the deposition proceedings to investigate the suspected [1685] noncompliance with the Court's order. *Babee-Tenda Corp.* v. *Sharco Mfg. Co.*, 156 F. Supp. 582, 587 (S. D. N. Y. 1957).

Damages for civil contempt may not be arrived at by mere conjecture. *Id.* at 588. Accordingly, if the parties are unable to agree on the monies thus recoverable, they are to submit affidavits and the Court will make the necessary determination.

Plaintiffs' request for an enlargement of the scope of the injunction must be denied. Plaintiffs contend that the injunction as it stands at this time is totally ineffective since it has allowed defendants to enter the market unfairly. But plaintiffs do not dispute that only one further order for the 1011 Alpine was received from the date of the injunction to the time when the defendants' new catalog was circulated and this order was refused. The main purpose of the injunction was to create a hiatus in the defendants' sales obtained through use of an improper photograph and its sales engendered by fair business means. Whether

defendants have complied with the injunction is immaterial in this limited respect since it is apparent that a cooling-off period was affected, [1686] albeit not by reason of the Court's order.

Additionally, portions of the injunction order were meant to expire by their terms upon the circulation of defendants' new catalog without the offending photograph. Other portions, such as the change in designation of the glasses and the segregation of bills, orders and other shipping records, still remain in effect so that the injunction can by no means be considered moot. Accordingly, it is this Court's opinion that extending the scope of the injunction would be an abuse of discretion and that plaintiffs are not entitled to this drastic remedy.

DEFENDANTS' MOTION TO VACATE THE INJUNCTION

There is ample authority for the proposition that an injunction order may be modified or dissolved in the discretion of the district court. However, such modification or dissolution requires a showing of changed circumstances so that continuance of the injunction is no longer justified and/or because it will work oppressively against the enjoined parties. *United States* v. *Swift & Co.*, 286 U. S. 106, 114-15 (1932); *Tanner Motor Livery, Ltd.* v. [1687] *Avis, Inc.*, 316 F. 2d 804, 810 (9th Cir.), cert. denied, 375 U. S. 821 (1963); *Tobin* v. *Alma Mills*, 192 F. 2d 133, 136 (4th Cir. 1951), cert. denied, 343 U. S. 933 (1952); *Grand Union Equip. Co.* v. *Lippner*, 167 F. 2d 958, 960 (2d Cir. 1948); *California Packing Corp.* v. *Sun Maid Raisin Growers*, 165 F. Supp. 245, 252 (S. D. Cal. 1958), aff'd, 273 F. 2d 282 (9th Cir. 1959); *Mitchell* v. *Helena Wholesale, Inc.*, 163 F. Supp. 101, 103 (E. D. Ark. 1958); see *S. C. Johnson & Son, Inc.* v. *Johnson*, 175 F. 2d 176, 177 (2d Cir.), cert. denied, 338 U. S. 860 (1949). In the absence of such a showing, the injunction will not be disturbed.

Accordingly, the sole issue I am faced with herein is whether there have been such new circumstances shown that would warrant dissolution of the injunction. Defend-

ants' contention that plaintiffs' cause of action is not within Section 43(a) of the Lanham Act, 15 U. S. C. § 1125(a), is not properly raised at this time since defendants have had their day in court on this issue (at least at this time), and neither appealed this Court's injunctive order nor sought timely reargument. Therefore any consideration of this issue does not fall within the [1688] aforementioned criteria for modifying or dissolving the injunction.[6] Moreover, the remainder of defendants' arguments, rather than showing a change in conditions from the time the injunction was granted, merely rehashes, in far greater detail to be sure, most of the arguments previously presented to the Court and as such would appear to be improperly raised herein. However, even considering the offer of proof as properly before this Court, I am more fully convinced than before that there was no impropriety in the granting of the injunction.

Defendants' version of the facts is set forth as follows: In 1965, Rayex decided to introduce a line of ski-sunglasses to be called "Astro-Ski." Raymond Tunkel, Rayex president, saw AO's C'Bon Camelet and thought it would make an attractive ski-sunglass if the Polaroid glass were removed therefrom and photochromic lenses[7] substituted. Defendants allege that Tunkel gave Oram Morin, manager of Rayex' Plainville, Connecticut, plant, a pair of Camelot glasses and asked him to make a hand-copy thereof, which was to be used as a prototype for a Rayex model. Mr. Tunkel allegedly received the handmade prototype from Morin and took it with him to [1689] Europe where it was intended that a mold would be made. While in Europe, Tunkel decided to have the glasses manufactured there thus eliminating the need for a mold, Tunkel purportedly took the prototype back with him from Europe and turned it over to Gordon Hallerman for the purpose of having it included in the Astro-Ski catalog. Hallerman claims to have taken the prototype to one Harvey Dresner, a pro-

fessional photographer who prepared photographs for the catalog. The handmade prototype allegedly disappeared at a subsequent sales meeting.

Plaintiffs contended that the deposition testimony of Tunkel, Hallerman and Dresner[8] is a fabrication and the record strongly indicates that plaintiffs' assertion is correct, as will be fully set forth *infra*. Defendants contend that plaintiffs' claim of a fabricated story is tantamount to a charge of fraud which must be proved by clear and convincing evidence. Defendants' argument is purely sophistic. An attack on the credibility of witnesses does not change the underlying action into a fraud action, nor shift the burden of proof. Nevertheless, even assuming defendants' argument to be worthy of merit, I conclude that plaintiffs have [1690] sustained the heavier burden which defendants seek to place on them.

At the outset, defendants rely heavily on the production by Morin, at his deposition, of a heavy wooden block, a steel template and two metal front-pieces which, defendants claim, fully corroborate the deposition testimony. Morin claims to have shaped the block to show the compound angles in the original front-piece and to insure his ability to reproduce those angles. The steel template was to be used as a pattern in making the front-piece for the prototype. Morin claims that the metal front-pieces were made at the same time as the front-piece for the handmade model and were duplicates thereof.

But would not a defendant who is accused of committing the acts alleged herein, to refute those accusations, attempt to locate some credible evidence that a prototype in fact existed and was used in the preparation of the catalog? Of course, the best evidence of this would be the prototype itself. Failing to locate this, defendant would be expected to produce the wooden [1691] block, the steel template and the duplicate front-pieces as evidence of the prior existence of the prototype. But where were these items in

June or July of 1966 when the motion was argued or when reargument could have been sought? Why was the Tunkel affidavit unsupported in June of 1966 if evidence of the existence of a prototype existed? I cannot accept the presence of these items at this time as any corroborative evidence whatsoever of the deposition testimony.

The major argument presented herein by defendants is that, on the prior motion, plaintiffs failed to inform the Court of the existence of a physical difference between the alleged Morin prototype and the C'Bon Camelot. Defendants claim that Morin, in shaping the outer end of the temple of the alleged handmade model, made a mark close to the ear end of the temple with his pliers, resulting in an abrupt angular change of the plane of the outer surface of the temple at that point and which appeared in the photograph as a sort of obelisk with a wide base, blunted tip and tapered sides, and in the bottom line of that surface as an angular change of line.

[1692] This contention is thoroughly refuted by plaintiffs. Firstly, Gino L. Agraz, an independent photographer employed by plaintiffs, at plaintiffs' request almost exactly reproduced this so-called plier mark in a pair of Camelot glasses by photographing said glasses on a dark background paper. It is his opinion that this mark was nothing more than a photographic highlight. While defendants dismiss the Agraz work as mere trick photography, I have examined his affidavit and the transcript of his testimony on this motion and find that he has candidly set forth the work he performed and his testimony is highly credible. Additionally, Mr. Dresner, defendants' photographer, admitted the authenticity of the Agraz work.

Secondly, at his deposition Mr. Morin was asked to combine one of the metal front-pieces he allegedly made with the frame of a stock model of the C'Bon Camelot. When he had done so, a photograph of the result of his work was taken by Dresner. This photograph almost exactly shows

the same angular change of line of the right temple which defendants characterize as [1693] peculiar to the 1011 Alpine catalog photograph. Both sides agree that the Dresner photograph is of the Camelot frame with the handmade front-piece. Thus, both differences alleged to exist are shown to be mere results of varied photographic conditions.

Thirdly, the Morin deposition indicates that both temples were flared out and had plier marks. Although the alleged Alpine photograph depicts the exterior portion of the right temple extremity and the interior portion of the left one, assuming the defendants are correct in their contention that a plier mark had been made, such plier mark is conspicuous by its absence from the left interior portion of the temple of the catalog picture. Defendants argue that the marking that would appear on the rear face would be entirely different than that appearing on a front face since the surface on the rear face is stretched out rather than bent in. Whether the marking on the inner surface would be the same or different is immaterial—some marking should appear either from the plier mark itself or from a highlight thereof if defendants are to be believed. Accordingly, for the foregoing reasons, I find defendants' [1694] plier mark argument without merit.

Certain other discrepancies in defendants' evidence appear which make the existence of a prototype unlikely. Hallerman testified that he took the prototype to Dresner to be photographed and that he knew that it was a handmade sample, *inter alia,* because "the finish of the front . . . of the hand-made sample . . . was a dull finish and did not look to me like a finished glass." Hallerman Deposition of November 8-9, 1966, at 306. He reiterated, "the hand-made sample which was given to me by Mr. Tunkel was dull and looked to me to be unfinished. It did not appear to be a sample which had been or could be purchased in a store as a first quality piece of merchandise." *Id.* at 307. On cross-examination, plaintiffs' counsel elicited from

Hallerman the response that the metal front-pieces of the handmade prototype resembled the duplicate metal front-pieces allegedly made by Morin *Id.* at 462-63. Defendants argue that it is probable the aluminum front-piece used in making the prototype was more highly polished than its duplicates, but that in any event the difference is only slight and can be readily [1695] accounted for by the handling it has received. The Hallerman testimony refutes defendants' first argument and, as for the alternate contention, I have examined the metal front-pieces of the so-called duplicates and they are dull, pitted and scarred. It is highly unlikely that a front-piece such as either of the duplicates could have possibly been used to obtain the highly-polished result that appears as the 1011 Alpine in the Astro-Ski catalog. Contrary to defendants' position, the difference is most pronounced, and graphic evidence of this has been presented to the Court in the Dresner photograph of the Camelot frame with the handmade front-piece which clearly indicates the inferior result that would have been obtained by using the handmade front-piece in the catalog picture.

It has also been shown by defendants' witnesses that on other occasions where Rayex had copied sunglasses no handmade prototype had been prepared. Rather, the sunglass to be copied had been used to prepare the mold. *Id.* at 460-61. It would appear highly unlikely for Rayex to have asked a busy executive such as Mr. Morin [1696] to spend one full week in the preparation of the prototype when all Tunkel had to do was take a pair of the Camelot glasses to Europe with him and have them used in preparation of the mold. The only possible purpose for the construction of the prototype would be for the catalog photograph, and no such purpose appears from the deposition testimony. Defendants' argument that AO prepared prototypes is irrelevant since AO is an innovator and must of necessity prepare something from which a mold can be made.

Additionally and most significantly, when Tunkel returned from Europe he corresponded with his French manufacturer and referred to the sunglasses he had taken with him as "the wrap-around type metal front polaroid glass." In the French manufacturer's reply of May 26, 1965, the sunglasses are referred to in the same manner, and in a letter of July 2, 1965 to Tunkel are again referred to as the "Polaroid sunglass." In Tunkel's reply of July 6, 1965, the glasses are described in the same way. It was developed in the Tunkel deposition that he was aware that "Polaroid" is a trademark of the Polaroid Company, that AO was the exclusive [1697] licensee of Polaroid polarizing material for a number of years, that Rayex had not sold Polaroid lens sunglasses for some ten years, that in 1964-1965 Rayex sold no polarizing lenses,[9] and that the C'Bon Camelot was sold with Polaroid lenses. It would appear from the foregoing that what Tunkel took with him to Europe was the Camelot rather than the Alpine prototype as he claimed. Defendants' only refutation of this argument is that it is pure speculation. Rather than being explained away, the above-mentioned conclusion is inescapable and renders Tunkel's testimony even more incredible.

All the factors hereinbefore set forth plus the great differences between the alleged Alpine photograph and the marketed product, and the absence of any sketches, notes, photographs or other identifying memoranda of Morin's work in preparation of a prototype lead to the conclusion that the July 1, 1966 injunction was properly granted. Any deficiencies alleged to have been present at that time (if these can even be considered to have affected the determination) have been readily cleared up by the extensive record herein which [1698] demonstrates, at least for the purpose of granting a preliminary injunction, that the photograph of the 1011 Alpine actually was that of the C'Bon Camelot.[10] This conclusion can be reached without

even considering the photographic evidence submitted by plaintiffs which shows almost perfect registry between the 1011 Alpine picture and the picture of a stock pair of C'Pon Camelot glasses. Any slight failure of registry is readily explained by the difference in temples in any two pairs of glasses, changes caused by buffing, polishing, wear in stamping tools, and numerous other variables.

Conclusions

Plaintiffs' motion to punish for contempt is granted to the extent indicated herein. If the parties cannot agree as to the appropriate monies to be recovered, affidavits should be submitted to the Court on this issue no later than May 15, 1967. Defendants' cross-motion to vacate the injunction is in all respects denied.

The findings of fact and conclusions of law [1699] as required by Rule 52(a) are contained herein.

Settle order on one (1) day's notice in conformity herewith.

Dated: New York, New York
April 26, 1967.

/s/ Charles H. Tenney
U. S. D. J.

[1700]

FOOTNOTES

[1] Pg. 5a. In the prior Opinion of the Court, dated June 28, 1966, it was determined that a sufficient relationship existed between the products of plaintiffs and defendants so that they are in competition.

[2] Pg. 9a. Other discrepancies in the Tunkel deposition will be pointed out *infra.*

[3] Pg. 11a. Paragraph 2A of the injunction order provided:

> 2. ORDERED that the defendants:
>
> A. Withdraw their ASTRO-SKI catalogue (Plaintiffs' Exhibit 2 annexed to the Complaint) by mailing to all persons, firms, organizations and companies known or believed to possess a copy of same, a letter in the form annexed as Exhibit A to this Order, said letter to be mailed by defendants within ten (10) days of the date of this Order. Defendants shall maintain accurate records of the addresses of such letters and the respective dates of mailing.

[4] Pg. 12a. Tunkel also stated:

> "I believe that on a Friday, *which was July 1st, when we first received this injunction order,* order of preliminary injunction, I sat down with Gordon Hallerman and also had a discussion with Mike Friedman and we tried to ascertain amongst ourselves who would possibly possess a catalog that we would know of, and between the three of us we came up with the names of the eleven people to whom the letters were sent." Tunkel Affidavit of November 14-15, 1966, at 834. (Emphasis added.)

[1701] An affidavit submitted on behalf of plaintiffs by one Nathan H. Lotter, legal and docket clerk for plaintiffs' counsel, indicates that the order was not signed until the close of the Court's business day on July 1, 1966. However, defendants' counsel was notified by my chambers of the signing of said order on that same day. That this conversation described by Tunkel in fact took place must be considered in the light of his statements on oral deposition that he was not in New York for most of the period from July 1 through July 17, 1966. No notice of the signing of the order appeared in the New York Law Journal until July 6, 1966. However, no weight need be given to this possible inconsistency in reaching the conclusions herein.

FOOTNOTES (Continued)

[5] Pg. 13a. Other arguments have been presented as well and have been alluded to and dismissed in the discussion *supra.*

[6] Pg. 17a. Defendants' argument on the law is that plaintiffs in order to bring themselves within the Lanham Act must show "a false designation of origin." See, *e.g., Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac* v. *Alexander's Dep't Stores, Inc.*, 299 F. 2d 33 (2d Cir. 1962); *Joshua Meier Co.* v. *Albany Novelty Mfg. Co.*, 236 F. 2d 144 (2d Cir. 1956). However, to sustain a cause of action under § 43(a) of the Act, a plaintiff must allege *either* "a false designation of origin, *or* any false description or representation." (Emphasis added.) See *Societe Comptoir De L'Industrie Cotonniere Etablissements Boussac* v. *Alexander's Dep't Stores, Inc., supra* at 36. Plaintiffs appear to have clearly brought themselves within the second alternative.

[7] Pg. 17a. The photochromic lens, a product of the American Cynamid Corp., was designed to respond to the degree of light prevailing so that in bright sunlight it turns a deep gray, cutting down the light transmitted, [1702] whereas in dim areas the lens retains its basic amber color, thus allowing a larger amount of light transmission.

[8] Pg. 18a. No discussion is necessary of the deposition of one Saul Lustig, foreman of Gordonian Lithographers, Inc., producer of the condemned catalog, since Lustig never claims to have seen the alleged prototype.

[9] Pg. 22a. The photochromic lenses used in the 1011 Alpine cannot be characterized as polarizing type lenses.

[10] Pg. 22a. Additionally, defendants' contention that AO failed to inform the Court of the difference in lenses between Alpine and Camelot is rejected. See n. 1 to *American Optical Co.* v. *Rayex Corp.*, F.Supp. , 66 Civ. 1633, S. D. N. Y., June 28, 1966.

Opinion on Appeal from Order of May 23, 1967 of the District Court for the Southern District of New York

(Argued April 24, 1968 Decided April 26, 1968)

[Reported only in 157 USPQ 465]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(HAYES, ANDERSON AND FEINBERG, Circuit Judges)

PER CURIAM:

Appellants appeal an order of the United States District Court for the Southern District of New York, Charles H. Tenney, *J.*, entered May 23, 1967, which granted plaintiffs' motion for contempt for failure to comply with a preliminary injunction, and denied appellants' cross-motion to vacate that injunction. The preliminary injunction in this action for unfair competition was granted by Judge Tenney on July 1, 1966, pursuant to his opinion reported at 266 F. Supp. 342 (S. D. N. Y. 1966). Appellants took no appeal from that order. Instead of seeking to obtain "a trial of the action on the merits," see Rule 65, Fed. R. Civ. P., appellants attempted four and one-half months later to have the preliminary injunction vacated despite their earlier failure to appeal. Appellants conceded at oral argument before us that their cross-motion to vacate the preliminary injunction was not based on changes in circumstances which occurred after the injunction was entered. It is clear that by their cross-motion appellants were merely trying to relitigate on a fuller record preliminary injunction issues already decided by Judge Tenney. We affirm the judge's refusal to vacate the injunction. As to the contempt, there was ample support for the judge's finding that appellants' "conduct has been in blatant disregard of the . . . preliminary injunction." We will not further consider at this stage of the proceeding the validity of the underlying preliminary injunction from which appellants took no appeal.

Judgment affirmed.

[1718] Order Appealed From

[Entered May 23, 1967]

This matter came on for hearing on the motion of plaintiffs for an order punishing defendants for a contempt of the preliminary injunction order of this Court of July 1, 1966, and for enlargement of said order, and on defendants' cross motion to vacate said order, and the Court having considered the record, including the testimony taken by deposition and that before the Court on January 18, 1967, and all exhibits submitted by the parties, and the memoranda of the parties in support of and in opposition to said motions, and having heard oral argument thereon, and being fully advised, the findings of fact and conclusions of law required by Rule 52(a), F. R. C. P. and Civil Rule 14(c)(1) of this Court being contained in Opinion No. 33448 of this Court, filed April 26, 1967.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that said motion for contempt by plaintiffs be granted, said motion for enlargement by plaintiffs be denied, and said cross-motion be denied.

[1719] It is further ORDERED that plaintiffs be compensated in the amount of Twenty Thousand Dollars ($20,000.00), said sum having been agreed by counsel for the parties as the reasonable expenses incurred by plaintiffs in presenting the contempt issue to the Court, including the expenses incident to defendants' cross-motion. Such amount shall be payable to plaintiff American Optical Company within 14 days from the date of entry of this

order, unless a bond in the amount of $23,000.00 be filed and approved by the Court prior to the expiration of said 14 day period.

Dated: New York, New York
May 22, 1967

/s/ CHARLES H. TENNEY
United States District Judge

Approved as to form:

/s/ MORTON AMSTER
Attorney for Plaintiff[s]

/s/ JOHN VAUGHAN GRONER
Attorney for Defendant[s]